LEO LUAN HUAT

v.

ANGELAI A/P SUPPIAH (ISTERI SAH DAN ORANG TANGUNGAN BAGI VEERIAH A/L KRISHNAN)

HIGH COURT MALAYA, PULAU PINANG
TUAN JEFFREY TAN JC
[CIVIL APPEAL NO. 12-19-1994]
24 MAY 1995

EVIDENCE: *Appellant seeking to adduce fresh evidence on appeal - Whether Court has discretion to admit further evidence - Courts of Judicature Act 1964, s. 69(3) - Necessity for special grounds - Falsified evidence admitted at trial - Wilful deception on the Court - Whether constituting special grounds - Whether conditions satisfied.*

The respondent had obtained from the Court below a sum in damages totalling RM68,500 for loss of dependency, bereavement and special damages. It was pleaded in the respondent's statement of claim that the deceased was an employee of one Muniandy and a letter to that effect was tendered during trial. The learned Sessions Judge took into account this evidence when awarding damages. It later transpired that the deceased was not working for him at the time of the deceased's death and the appellant then sought by way of motion to adduce fresh evidence to refute the respondent's evidence that the deceased was employed by Muniandy, thereby putting serious doubts on the validity of the award for loss of dependency.

Held:

[1] Section 69(3) of the Court's of Judicature Act imposes strict conditions on the adduction of evidence concerning matters arising before the trial or hearing, and a party who seeks to raise additional evidence concerning matters before judgment after a trial or hearing on the merits must show "special grounds". The general rule is that fresh evidence on appeal is not to be admitted unless two conditions are satisfied, namely, that the new evidence was not available at the time of the trial to the party seeking to use it, or that reasonable diligence would not have made it available, and that the fresh evidence, if true, would have been likely to have had a determining influence upon the Court below.

[2] In assessing the loss of RM300 per mensem, the learned Sessions Judge had directed his mind to the statements that the deceased was gainfully employed as a labourer at the material time, and as the factual basis for his calculation of the award of loss under s. 7 of the Civil Law Act 1956. The factual basis of the learned Sessions Judge's finding had been falsified to such an extent that it would be unjust to leave matters as they were. There was a strong *prima facie* case of wilful deception on the Court, and considering the facts of the case that *prima facie* case was itself special ground for the admission of fresh evidence.

[Motion allowed; case remitted to Sessions Court for fresh evidence to be adduced with leave to either party to call or recall any witness or witnesses for examination or cross-examination].

Cases referred to:

William Jacks & Co. (M) Sdn. Bhd v. Chemquip (M) Sdn. Bhd. & Anor [1991] 2 MLJ 555 ***(refd)***
Heinemann Ltd v. Christie [1960] MLJ 99 ***(refd)***
Re Shawcross [1956] MLJ 104 ***(refd)***

Re GG Ponnambalam [1969] 2 MLJ 263 ***(refd)***
Lau Cher Hian v. Collector of Land Revenue, Muar [1971] 1 MLJ 96 ***(refd)***
Shedden v. Patrick [1869] LR 1 Sc & Div 470 ***(refd)***
Rajendra Prasad v. Public Prosecutor [1991] 2 MLJ 1 ***(refd)***
Fresh Food & Refrigerating Co. Ltd v. Sime & Co. [1935] MLJ 196 ***(refd)***
New Brunswick Rly Co. v. British and French Trust Co. [1939] 4 All ER 747 ***(refd)***
Lam Soon Cannery Co. v. Hooper & Co. [1965] 2 MLJ 148 ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***
Skone v. Skone [1971] 2 All ER 582 ***(refd)***

Legislations referred to:
Civil Law Act 1956, s. 7
Court of Judicature Act 1964, ss. 29, 69(1), (2), (3), (5)
Rules of the High Court 1980, O. 56 r. 3A
English Law Reform (Marriage & Divorce) Act

For the appellant - Balachandran Mahesan; M/s Bala Mahesan & Khairudin
For the respondent - Teja Singh; M/s Teja Singh Penesar & Co

JUDGMENT

Jeffrey Tan JC:

This was an appeal against the judgment of the Sessions Court given on 1 February 1994, wherein the learned Sessions Judge awarded to the respondent the sum of RM68,500 of which RM57,000 was for loss of dependency under s. 7 of the Civil Law Act 1956, RM10,000 for bereavement and RM1,500 as special damages.

The respondent's claim arose out of an accident on 2 June 1989 when the appellant driving motorcar PBP 6816 hit and killed the respondent's late spouse, one Veeriah a/l Krishnan (deceased) while the deceased was walking along Jalan Air Itam, Georgetown. In the proceedings below it was mutually agreed that liability shall be equally apportioned between the deceased and the appellant.

Besides the appeal, the appellant also filed a motion on 24 December 1992 to adduce fresh evidence, namely the evidence of Muniandy a/l Kuttumalai (Muniandy) that the deceased was not working for him at the time of the deceased's death, which would be contrary to the respondent's testimony in the Court below. In his motion, the appellant unveiled what purportedly was the statutory declaration (Exhibit KA2) of Muniandy in which he declared he was never the employer of the deceased. The appellant in effect sought to adduce fresh evidence tending to refute the respondent's evidence that the deceased was employed by Muniandy, and thereby putting to serious doubt the validity of the award under s. 7 of the Civil Law Act. The appeal depended on the outcome of the motion and not surprisingly was left unargued, and Counsel for both parties solely addressed the Court on the motion but not the appeal proper.

It was not disputed that the respondent had pleaded in her statement of claim that the deceased was an employee of Muniandy. At the trial the respondent tendered a letter dated 21 June 1989 (KA1) purportedly from Muniandy, as the affirmation that the deceased was indeed employed by Muniandy as a general labourer at the material time, but Muniandy was not called upon to give such oral evidence. At any rate, the learned Sessions Judge having taken into account the evidence of the respondent, the average income of a labourer in Malaysia and the living expenses of the deceased, assessed the respondent's loss at RM300 per mensem for 16 years.

The motion was supported by an affidavit of one Mr. Khairudin Alaudin (Khairudin), who was Counsel for the appellant at the trial. In his affidavit Khairudin expressed doubts on the reasons proffered for Muniandy not being called as a witness. He said he had advised the appellant's insurers to appoint adjusters to trace Muniandy. However only on the very day that judgment was delivered was he notified that Muniandy had been traced. When he interviewed Muniandy subsequently, he discovered the startling revelations as in the statutory declaration (KA2).

The contents of the statutory declaration (KA2), if true, could be ruinous to the award of loss, and indeed was sufficient ground justifying the appellant's complaint, as emphatic as it was biting, that the respondent had wilfully deceived and misled the Court into believing that the deceased was gainfully employed at the time of his death.

On the motion to adduce further evidence, s. 29 of the Court of Judicature Act 1964 provides that the High Court hearing appeals from Subordinate Courts shall have the like powers as the Court of Appeal has on the hearing of appeals from the High Court, the corollary being the High Court having powers to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner (see sub-section 69(1) of the CJA; *William Jacks & Co. (M) Sdn. Bhd v. Chemquip (M) Sdn. Bhd. & Anor* [1991] 2 MLJ 555).

Further evidence may be given without leave on interlocutory applications or in any case as to matters which have occurred after the date of the decision appealed against (see sub-section 69(2) of the Court of Judicature Act 1964) unless the appeal was against a judgment after trial or hearing of any cause of matter upon the merits (see sub-section 69(3) of the CJA) in which case further evidence can only be admitted on special grounds and with leave (see also *Heinemann Ltd v. Christie* [1960] MLJ 99). Subsection 69(5) of the CJA 1964 further provides that those powers may be exercised notwithstanding that the appeals is only against part of the decision, in favour of one or more of the parties although they have not appealed against the decision.

Section 69(3) of the CJA imposes strict conditions on the adduction of evidence concerning matters arising before the trial or hearing, and a party who seeks to raise additional evidence concerning matters before judgment after a trial or hearing on the merits must show "special grounds". What are special grounds is not specifically defined, but the following judicial pronouncements are illuminative:

(a) the words special grounds are wide and flexible words ... no Court can or should attempt to lay down an exhaustive definition of those words. Each case must depend upon its own particular facts and it is for the Court to say whether the facts are so special and exceptional ...

per Whyatt CJ (Singapore) in *Re Shawcross* [1956] MLJ 104;

(b) It thus seems to me a salutory rule to observe, that one may safely say what are not special grounds, rather than state affirmatively what constitutes a special ground. The legislature advisedly left the question open. I do not think the Courts should step in where the legislature fears to tread.

per Ong Hock Thye CJ in *Re GG Ponnambalam* [1969] 2 MLJ 263 at 264;

(c) What are special grounds must be decided according to the facts of each case.

per Ong Hock Thye in *Lau Cher Hian v. Collector of Land Revenue*, Muar [1971] 1 MLJ 96 at 98.

However, the conditions upon which such evidence is admitted are well established. The general rule was laid down by the House of Lords in *Shedden v. Patrick* [1869] LR 1 Sc & Div 470 that being in the public interests that there should be an end to litigation, fresh evidence on appeal is not to be admitted unless two conditions are satisfied namely,

(1) that the new evidence was not available at the time of the trial to the party seeking to use it, or that reasonable diligence would not have made it available;

(2) that the fresh evidence, if true; would have had or have been likely to have had, a determining influence upon the Court below.

There is a wide discretion whether or not to admit further evidence (*Rajendra Prasad v. Public Prosecutor* [1991] 2 MLJ 1) and said to be an important factor to be taken into account in exercising the appellate Court's discretion is the reason why the evidence was not adduced in the Court below (*Fresh Food & Refrigerating Co. Ltd v. Sime & Co.* [1935] MLJ 196). An appellate Court admitting under strict conditions and limitations further evidence may even necessitate it to make a different order from that of the trial Judge (see *New Brunswick Rly Co. v. British and French Trust Co.* [1939] 4 AER 747).

The leading authority now constantly applied (so in *Lam Soon Cannery Co. v. Hooper & Co.* [1965] 2 MLJ 148 and *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 and a *series rerum judicatarum*) is the case of *Ladd v. Marshall* [1954] 3 AER 745 where Lord Denning L.J (as he then was) neatly packaged the conditions as the following:

(a) the evidence could not with reasonable diligence have been obtained earlier,

(b) the evidence if believed would have an important influence on the outcome of the case, and

(c) the evidence is not inherently improbable.

The first two conditions now find codification in O. 56 r. 3A of the RHC 1980 with regards to appeals to a Judge of the High Court from any judgment, order or decision of a Registrar.

Persuading the Court that the first of those three conditions was satisfied, the appellant by his Counsel's written submission asserted that the evidence of Muniandy could not with reasonable diligence have been obtained earlier, that is before the judgment, for Muniandy was presumably the respondent's witness and was apparently not accessible, to him or his solicitors. He calculated that at some point during the trial, Muniandy as a material witness of importance would tender his evidence in Court, and he would then avail himself of the opportunity presented to test the respondent's evidence on the deceased's state of employment.

However, that was a miscalculation for the respondent after giving her evidence, closed her case without the evidence of Muniandy. Wrong footed and taken by surprise the appellant proffered no evidence. The pace of the proceedings was thus quickened, for with the delivery of oral submissions the trial was all over barring the judgment that was delivered a few days later on 1 February 1994.

The respondent's reply to the motion was contained in an affidavit affirmed by Mr. Teja Singh, the respondent's Counsel, who said that Mr. Khairudin knew that the respondent had issued a subpoena for the attendance of Muniandy. Although the respondent's subpoena was not served, yet when the case was adjourned at the close of the plaintiff's case, the appellant had the time and opportunity afforded by that adjournment to take

steps to secure the attendance of Muniandy; not having done so, the appellant was as such estopped from making the motion, to re-open the case by adducing what should have been brought out earlier.

Skone v. Skone [1971] 2 All ER 582 was a case involving an appeal to the House of Lords by the husband petitioner against the order of the Court of Appeal refusing his application to adduce further evidence on appeal against the decision of the trial Judge dismissing his petition for dissolution of marriage on the grounds of adultery by his wife with the co-respondent. At the trial, the wife respondent filed no answer and took no part in the proceedings. However the co-respondent gave evidence at the trial denying adultery. The trial Judge accepted the version of the co-respondent and dismissed the husband's petition. It so transpired that a few days after the petition was dismissed the wife produced a bundle of love letters purporting to be written by the co-respondent during the relevant period which tended to show that the co-respondent had given false evidence at the trial, and tended to show that adultery was committed as alleged. Motion was then made to the Court of Appeal to adduce this fresh evidence on appeal against the order of the trial Judge, but was rejected on the ground that the evidence was available and could have been obtained before trial. The Court of Appeal was informed by Counsel for the husband that on his advice, in view of the facts as known to the husband and his advisers during the hearing, no attempt had been made to call the wife as a witness in support of the petition.

Although the dissolution of marriage in *Skone v. Skone* was determinable according to the law applicable before the English Law Reform (Marriage & Divorce) Act, the husband petitioner's motion however was pertinent to the instant motion for the adduction of fresh evidence. In the House of Lords it was held that the love letters could not have been obtained for use at the trial with reasonable diligence on the husband's part, because although on the face of it the husband, through his advisers, ought, in the exercise of reasonable diligence, to have made enquiries of the wife to see whether she might have been willing to give evidence, at all material times the wife was in the opposite camp as a potential ally of the co-respondent and the husband and his advisers could not be criticised for not obtaining or seeking to obtain a statement from her after the enquiry officer had failed to do so.

While it was not suggested that Muniandy was a potential ally of the respondent, he was certainly a potential witness in the opposite camp, for a document (KA1) purportedly from him was a key document relied on by the respondent, and there was no reason to suspect that Muniandy was not the deceased's employer. As such while the action was pending and the trial was in progress, the diligence of the appellant or his Counsel would not have permitted them even if they so yearn, to meet with Muniandy and discover what was later on discovered.

In assessing the loss of RM300 per mensem, the learned Sessions Judge *inter alia* took into account the average income of a labourer in Malaysia, and as such had directed his mind to the statements in KA1 that the deceased was gainfully employed as a labourer at the material time, and as the factual basis for his calculation of the award of loss under s. 7 of the Civil Law Act 1956. If the evidence in KA2 was what they purported to be, it was evidence that was such as to be apparently credible and not inherently improbable, and would have if believed had an important bearing on the outcome of the case.

The appellant had therefore satisfied the conditions in *Ladd v. Marshall* for the Court's exercise of its discretion. That discretion was exercised in favour of the motion, and there was scant reason not to do so for the factual basis of the learned Sessions Judge's finding had been falsified to such an extent that it would be unjust to leave matters as they were. There was a strong *prima facie* case of wilful deception on the Court, and considering the facts of the case that *prima facie* case was itself special ground for the admission of fresh evidence.

The motion was accordingly allowed; the case was remitted to the Sessions Court for fresh evidence to be adduced, with leave to either party to call or recall any witness or witnesses for examination or cross-examination.